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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 369

WILLIAM HERMANN GODEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Comes now your petitioner, William Hermann Godel, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on May 20, 1966.

CITATION TO OPINIONS BELOW

The opinion of the District Court, *United States v. John Archibald Wylie* and *William Hermann Godel* is unreported. The opinion of the Fourth Circuit Court of Appeals, *United States of America, Appellee v. William*

Hermann Godel, Appellant, attached hereto as Appendix B, has not yet appeared in the printed advance sheets.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 20, 1966. This Court granted an extension of time in which to file this petition on June 17, 1966, extending the time for such filing to and including July 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 8(b), F. R. Crim. P., permits the trial of defendants in a single Federal criminal trial for substantive offenses which are not alleged to be part of the same transaction or series of transactions.

2. Whether the Allen charge should have been given under the particular circumstances of this case and, further, whether this Honorable Court should now state its disapproval of the charge.

3. Whether the sentence imposed by the District Court in this case, as well as those imposed in other Federal criminal cases, ought to be reviewable by the Federal appellate courts.

STATEMENT

Petitioner, William Hermann Godel, along with John Archibald Wylie and James Robert Loftis, Jr., were charged with various offenses against the United States of America. Godel and Wylie were charged in the first count of the indictment under Section 371 of Title 18, U.S.C., with conspiracy to violate Sections 287, 641 and 1001 of 18 U.S.C. A total of thirty-one overt acts were thereunder enumerated. In addition, Godel, Wylie and Loftis were charged with a number of separate substantive crimes involving violations of 18 U.S.C. 641 (embez-

zlement), 18 U.S.C. 287 (making a false, fictitious, or fraudulent claim against the United States), and 18 U.S.C. 1001 (making a false, fictitious, or fraudulent statement in any matter within the jurisdiction of any department or agency of the United States). The indictment did not allege that the substantive counts were all related to the conspiracy set forth in Count 1.

Subsequently, Loftis was granted a severance, and Godel and Wylie were tried together. Wylie was found guilty of conspiracy and guilty of embezzlement, but not guilty of making a false claim. Godel was found guilty of conspiracy, guilty of making a false claim, but not guilty of embezzlement. Loftis was acquitted of all charges against him in a later trial.

Godel was sentenced to confinement for five years in a Federal penitentiary, which was the maximum on each of the two counts upon which he was found guilty. Wylie received a like sentence of five years confinement, which was one-half the maximum penalty under the embezzlement charge upon which he was found guilty.

Godel effected his appeal to the Fourth Circuit Court of Appeals, which rendered a decision on May 20, 1966, affirming the District Court action.

REASONS FOR GRANTING THE WRIT

1. The Congress has established specific guidelines for joinder of defendants in a single trial. Rule 8(b), F.R. Crim. P., requires that the indictment must allege that the defendants ". . . participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." This is a mandatory requirement and, in the absence of such an allegation, relief from misjoinder is a matter of right, not simply discretion. See *Ward v. United States*, 289 F.2d 877 (D.C. Cir. 1961) and 8 Moore, Federal Practice (2d Ed.) pp. 8-23.

With all due respect to the very able judges who heard this case in the Fourth Circuit, petitioner believes that the argument which was presented before that Court with respect to Rule 8(b) was not fully appreciated. Petitioner insists that a reading of the indictment indicates that although a conspiracy is charged therein, there is no allegation that all of the substantive crimes there charged are related to the conspiracy. The rights of an accused are placed in grave jeopardy if the government may try several defendants for totally unrelated crimes by the simple expedient of charging conspiracy in the indictment.

In the trial of Wylie and Godel, a total of seventeen counts were tried, one alleging the conspiracy, six charging Godel with substantive crimes and ten charging Wylie with substantive crimes. Though the learned opinion of the District Judge writing for the Fourth Circuit points out one count of substantive crime which was proven to have been related to the conspiracy, the evidence as presented by the government showed that many of the substantive crimes with which Wylie was charged in no way related to Godel or to any Godel-Wylie conspiracy. Count 9 charging Wylie with embezzling $1,500.00 on March 21, 1962, involved an advance or loan of which Godel had absolutely no knowledge. Count 10 dealt with a $500.00 embezzlement by Wylie on May 23, 1962, of which Godel had no knowledge. Counts 13, 18 and 34 charged Wylie with embezzling sums of money from Class A Agents with whom Godel was in no way involved and who had never even heard of him. Although some of these counts were dismissed and, accordingly, not submitted to the jury (9, 10 and 13), the evidence relating thereto was heard by the jury and is bound to have affected Godel adversely.

While it may be true, as the Fourth Circuit opinion in this case states, that "where co-defendants are charged with separate substantive offenses, the substantive counts are not misjoined where the conspiracy count, the connecting link of the substantive counts is proved," neither the indictment nor the proof showed that all the separate sub-

stantive counts charged against Wylie and Godel were related to the conspiracy. In this case the conspiracy does not provide any such connecting link as is provided for in Rule 8(b). To hold otherwise would be to emasculate the effectiveness of the Rule as a safeguard against mass trials.

2. Petitioner requests this Court to reconsider the wisdom of the Allen, or dynamite, charge, especially in the light of the circumstances under which the charge was given in this case.

This was a most complicated case to try and to decide in the District Court. The trial took approximately two weeks; there was considerable testimony to review; there were approximately 150 exhibits to study; the jury had listened to a 39 page charge, and had to consider a verdict on each of nine counts. The government produced a large number of witnesses, many of whom were brought from distant parts of the world. On the morning of the third day of deliberation the Court asked the jury if they wished to be recharged, in response to which the jury said they did not. Later the same day, the Court asked the counts on which the jury were deadlocked, and upon learning that, the Court proceeded to give the Allen charge "with some ad-libbing." The judge began by stating:

> "This is an important case. The trial has been expensive in time and effort and money to both the defense and the prosecution. If you should fail to agree on a verdict, and that is a verdict on any count, because each count is a separate charge, the case as to that charge or count is left open and undecided. Like all cases it must be disposed of sometime. There appears no reason to believe that another trial would not be costly to both sides, nor does it appear there is any reason to believe that the case can be tried again by either side better or more exhaustively than it has been tried before you."

The so-called Allen charge originates from two ancient state court cases, *Commonwealth v. Tuey*, 8 Cush. 1

(Mass.),[1] and from *State v. Smith*, 49 Conn. 376. In *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896), this Court held that it was not error for a District Court to give a charge based on the two above state cases. Since that date the charge has been vari-

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[1] The charge in the *Tuey* case is reprinted below:

"The only mode, provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, that you are selected in the same manner, and from the same source, from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the Commonwealth to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his mind is a reasonable one, which makes no impression on the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if the majority are for acquittal, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

ously used and misused by the Federal courts, sometimes being approved, e.g., *Wolin v. United States*, 211 F.2d 770 (4th Cir. 1954), and sometimes disapproved, e.g., *United States v. Smith*, 303 F.2d 341 (4th Cir. 1962); *United States v. Rogers*, 289 F.2d 433 (4th Cir. 1961). Although this Court has considered several Allen charge cases since 1896, e.g., *Jenkins v. United States*, 380 U.S. 445, 85 S.Ct. 1059, 13 L. Ed. 2d 957 (1965), (per curiam opinion holding charge given was coercion), there has been no in depth consideration of the charge itself and its place in modern criminal judicial administration.

The version of the Allen charge given by Judge Lewis in the instant case deviated from accepted bounds in several respects. The Lewis charge emphasized the importance of the trial and its expense in effort and money. No such emphasis appears in the original charge. The charge was given several hours after the jury had indicated they did not wish to be recharged, and immediately after the reading back to the jury of some especially damaging testimony, part of which was omitted by the reporter. See Appellant's Appendix, p. 243a. At the time when the charge was given the Judge had been advised by the jury that they were deadlocked, and upon what counts they could not reach agreement. See Appellant's Appendix, p. 231a.

Petitioner urges that the substance of the charge, coupled with the circumstances surrounding it, was effective coercion by the Judge. More important, petitioner urges this Court to take this opportunity to express its disapproval of the charge. As Judge Brown wrote in dissent in *Huffman v. United States*, 297 F.2d 754 (5th Cir. 1962), "... in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the Allen charge." 297 F.2d at 759.

When the interests of society in seeing that court dockets are cleared, that expense of litigation is minimized, and that trials are speedy and are balanced against an accused's right to a fair jury trial, unimpaired by any pos-

sible coercion, as granted by the Sixth Amendment to the Constitution, it is clear that the Allen charge serves no decent purpose. The charge opens the door too easily to an inadvertent slip by the trial judge, and to circumstances of coercion even when most carefully handled. Again quoting from the Brown dissent in the *Huffman* case above, "The time has come . . . to abolish this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great." 297 F.2d at 759.

3. Little does it avail an accused in a criminal proceeding to be clothed with safeguards at the time of investigation and trial if the most awesome power of deciding his fate upon conviction is left in the hands of one judge with no opportunity for review except in the rarest of circumstances. See *Shepard v. United States*, 257 F.2d 293 (6th Cir. 1958). Circuit Courts of Appeals ought to be given power to review sentences and to correct injustice and lack of wisdom. There is mounting concern on the bench that such review ought to be afforded to convicted persons. See, e.g., *United States v. Pruitt*, 341 F.2d 700 (4th Cir. 1965); Address by Judge Sobeloff printed in 32 F.R.D. at 264 (1962).

The Congress has expressed its concern that there be provision made for judicial review of sentences by a number of bills which have been introduced in the past ten years directed at the problem. Though none of these bills have reached a vote, the various hearings which have been held in connection therewith have amply demonstrated the need for such review. Senator Joseph D. Tydings states the issue well:

> "The absence of any procedure for appellate review of a sentence is an anomalous exception to the concern shown in the review of every other aspect of a criminal proceeding handled at the trial level. Appellate courts carefully study methods by which evidence was secured and the instructions given by the trial judge to guide the jury's determination of the guilt or innocence of the accused . . . . Where error is found in any of these aspects of the trial

> that error may be corrected on appeal. Yet, if a Federal judge imposes an unreasonable sentence, the law provides no explicit means for the review of that sentence by a higher court."
>
> — Hearings before the Subcommittee on S. 2722, p. 2 (1966).

One court has taken upon itself the review of a sentence in conjunction with the ". . . proper administration in the federal system," *United States v. Wiley*, 278 F.2d 500 at 503 (7th Cir. 1960). The rule more generally followed is that the appellate courts will not review a sentence which is within the limits allowed by statute in the absence of the most exceptional circumstances. Appellate review of sentences is an essential item in the protection afforded citizens by the courts. This case presents to this Court the opportunity to grant the long needed power to review sentences.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATUTES

18 U.S.C. Sec. 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. Sec. 287. *False, fictitious or fraudulent claims*

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 698.

18 U.S.C. Sec. 641. *Public money, property or records.*

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property

made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted -

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. June 25, 1948, c. 645, 62 Stat. 725.

18 U.S.C. Sec. 1001. *Statements or entries generally.*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or conveys up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Rule 8(b) - F.R. Crim. P. *Joinder of Offenses and of Defendants.*

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,140.

United States of America,
Appellee,

versus

William Hermann Godel,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued January 7, 1966. Decided May 20, 1966.)

Before SOBELOFF and BELL, Circuit Judges, and BUTLER, District Judge.

E. Waller Dudley for Appellant, and C. V. Spratley, Jr., United States Attorney, and Philip R. Monahan, Attorney, Department of Justice, (Fred M. Vinson, Jr., Assistant Attorney General, on brief) for Appellee.

BUTLER, District Judge:

In this appeal William Hermann Godel challenges his conviction for conspiracy and filing a false statement, in violation of 18 U.S.C.A. § 371 and 18 U.S.C.A. § 1001, respectively. In substance, the government contends that Godel, a government employee assigned to the Pentagon, conspired[1] with his co-defendant (John Archibald Wylie), another Pentagon official, to appoint fiscal agents within the Department of Defense from whom Godel and his co-defendant later unlawfully borrowed government funds,

[1] *Count 1* charged that Godel and his co-defendant, Wylie, conspired from about May 29, 1961, to November 6, 1963, to violate 18 U.S.C.A. §§ 641, 287, and 1001, and to defraud the United States of money and property in violation of 18 U.S.C.A. § 371. It was alleged that, as part of the conspiracy, Wylie, the Director of Budget and Finance in the Office of the Secretary of Defense, appointed certain officers of the United States armed forces as "Class A Agents" who were authorized to draw government funds for use in cofidential enterprises of the United States; that Wylie and Godel, the Deputy Director of the Advanced Research Projects Agency (ARPA), another unit in the Office of the Secretary of Defense, thereafter obtained portions of these funds, issued hand receipts to the Class A Agents, falsely stating that the moneys so obtained were to be used for official expenses, and converted such funds to their own use; and that the defendants later caused these officers to be reimbursed out of government funds by submitting false vouchers and documents on the basis of which Treasury reimbursement checks were issued.

which they converted to their own use, and thereafter submitted false statements[2] in an effort to conceal the conversions.

Godel, tried with Wylie, was found guilty by a jury in Alexandria Division of the United States District Court for the Eastern District of Virginia. His motions for judgment of acquittal and for a new trial were both denied, and he was sentenced to five years in prison on each of the two counts, the sentences to run concurrently. He asks this court to set aside his conviction and enter a judgment of acquittal, or, in the alternative, grant him a new trial.

Godel lists eighteen assignments of error and concludes with a request that, if the conviction is sustained, this court either vacate or reduce the sentences, on the theory that the sentences imposed are unfairly harsh under the circumstances. We find no reversible error in the trial and deem ourselves without authority to alter the sentences imposed. The conviction and sentences are therefore affirmed.

In arriving at this conclusion, the court has considered Godel's assignments of error in the order in which they appear in his brief. For purpose of convenience we dispose of them in the same order here.

The record is replete with testimony and exhibits refuting Godel's contention that the evidence is insufficient to sustain a conviction on the conspiracy count. A conspiracy

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[2] *Count 5* charged Godel alone with having made a false and fraudulent statement in a matter within the jurisdiction of the Department of Defense, to wit, a statement submitted July 21, 1961, to the effect that $10,000 had been obligated for certain confidential projects in Vietnam, in violation of 18 U.S.C.A. § 1001.

"need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances' ". Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457 (1942), Harris v. United States, 283 F.2d 923 (4 Cir. 1960). The jury could reasonably infer from the facts and circumstances relating to the numerous transactions between Godel, Wylie, and the Class A Agents that the defendants acted with a mutual understanding as to the unlawful purpose to be accomplished, and that they cooperated and acted together in the accomplishment of that purpose.

As was said in Phelps v. United States, 160 F.2d 858, 867-868 (8 Cir. 1947):

> "It is not for us, on an appeal from a conviction, to weigh the conflicting facts, circumstances and inferences of the trial proceedings, but only to consider whether the evidence in its most favorable aspect to the government is legally capable of allowing a jury to become persuaded of guilt."

Godel's contention that the evidence is insufficient to sustain a conviction on the false statement count is without merit. The government's evidence is to the effect that a $10,000 Treasury reimbursement check was issued to Godel and that he converted the money to his personal use rather than for "confidential" projects in Vietnam as Godel contended. The government's proof on this count is not so lacking as to cause this court to upset the jury finding as unsupported by the evidence. On the contrary, the evidence clearly supports the verdict.

Godel's motion for a severance was properly denied. Godel does not object to the joinder with Wylie on the conspiracy count; rather, he contends that the court should have granted a severance of the substantive counts. Severance is not a matter of right where two defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Rule 8(b), Fed.R. Crim.P. Here, Godel and Wylie are charged in the first count with conspiracy involving a series of acts relating to embezzlement of public money, filing false claims, and making false statements in matters affecting the government. Overt act No. 5 in the conspiracy count charges that on or about July 21, 1961, Godel submitted a written memorandum to the co-defendant Wylie (an official of the Department of Defense) that Godel's office had obligated $10,000 for certain confidential projects. Count 5 charges Godel with the substantive offense of making the same false statement on the same date as overt act No. 5. The indictment taken as a whole must be construed as charging the defendants with participation in the same acts or transactions even though Count 5 does not in terms charge participation by the defendant Wylie. United States v. Welsh, 15 F.R.D. 189 (D.C.D.C. 1953). It is not required that all defendants be charged in each count. Rule 8(b), Fed.R.CrimP., Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945 (1960). Where co-defendants are charged with separate substantive offenses, the substantive counts are not misjoined where the conspiracy count, the connecting link of the substantive counts, is proved. United States v. Wright, 309 F.2d 735 (7 Cir. 1962).

Godel contends that, because he was *acquitted* on charges of embezzling portions of the $10,000 with respect to which he was *convicted* of filing a false statement under Count 5, the two verdicts are inconsistent and the latter should be set aside. This view overlooks the fact that the mere filing of a false statement constitutes an offense under the statute. Loss or damage to the government is not an essential element of the crime, Morgan v. United States, 301 F.2d 272 (9 Cir. 1962). Moreover, an acquittal on one count of an indictment cannot be pleaded as res judicata of other counts in the same indictment. United States v. Woodell, 285 F.2d 316 (4 Cir. 1960), United States v. Freeman, 286 F.2d 262 (4 Cir. 1961).

Godel contends the court erred in reserving its ruling on the motion for acquittal made at the close of the government's case. Although the trial judge did not speak precisely, we feel that the context of his remarks makes clear that the court was denying the motion for acquittal subject to the right of Godel to renew it at the close of all the evidence. But even if a ruling on defendant's motion was reserved, error cannot be considered prejudicial where the government's evidence at the time motion for acquittal is made is sufficient to present a jury question as to defendant's guilt. Weathers v. United States, 322 F.2d 566 (9 Cir. 1963).

Godel's contention that he was denied a fair trial by the manner and extent to which the district judge interrogated the defendant and witnesses is without merit. We agree with appellee's view that:

> "In none of the instances, relied on by Godel, of participation by the judge in the proceedings, viewed singly or collectively, were the bounds of propriety or impartiality overstepped, nor in any way was he motivated by any purpose other than to understand the testimony himself, to make sure that the jury also understood, to develop points which he thought had been inadequately explored by counsel, or to keep the trial of this highly complex case from getting bogged down in a morass or inconsequential detail."[3]

A trial judge, who is after all "the only disinterested lawyer connected with the proceeding", has the duty to help make clear to the jury the facts and circumstances pertinent to the case. "He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other." Simon v. United States, 123 F.2d 80, 83 (4 Cir. 1941). We feel that the trial judge did not exceed the bounds of permissible inquiry in this case.

Finally, the defendant's contention that the concurrent sentences of five years imprisonment on each of two counts is excessively harsh is without merit. We have recently reaffirmed "the well established principles that we have no power, in the absence of the most exceptional circumstances, to review a sentence which is within limits allowed by statute * * * and unless or until the Congress or the Su-

[3] Brief for Appellee, pp. 30-31.

preme Court has spoken to the contrary we are disposed to follow our established precedent." United States v. Pruitt, 341 F.2d 700 (4 Cir. 1965).

The concurrent sentences imposed in this case are within the statutory limits and we are not persuaded that exceptional circumstances exist to justify a review by this court.

We have considered appellant's remaining assignments of error and find them to be without merit.

Affirmed.

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